ileges. *Univ. of Pennsylvania*, 493 U.S. at 183; *Robertson v. Neuromedical Center*, 169 F.R.D. 80, 83 (M.D. La. 1996) ("There is no historical or statutory basis for a peer review materials privilege"). The starting point in the analysis for recognition of a privilege is always the "fundamental principle that 'the public . . . has a right to every man's evidence.'" *Univ. of Pennsylvania*, 493 U.S. at 183 (*quoting Trammell*, 445 U.S. at 50).

The power to recognize new privileges is not unfettered. This Court has cautioned that courts must be "***especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.***" *Univ. of Pennsylvania*, 493 U.S. at 189 (emphasis added). And Congress has considered the peer review issue at least six times, and has declined to create a federal peer review privilege that would protect the discovery requested here.

In *University of Pennsylvania*, an action brought under Title 7 of the Civil Rights Act of 1964, this Court determined that neither federal common law, nor the First Amendment, warranted the recognition of a privilege for the peer review materials sought—a university's tenure review files. In rejecting the claim of privilege, the Court emphasized Congress' failure to create a privilege for peer review documents, in extending Title 7 to educational institutions. *Univ. of Pennsylvania*, 493 U.S. at 189.

Similarly, in 1986, Congress passed the Health Care Quality Improvement Act, whose purpose was to "encourage peer review proceedings by which hospitals evaluate and discipline staff physicians . . ." by limiting the financial liability of those participating in the proceedings. *Chalal v. Northwest Medical Center, Inc.*, 147 F. Supp. 2d 1160, 1170 (N.D. Ala. 2000), *aff'd*, 250 F.3d 749 (11th Cir. 2001), *cert. denied*, 534 U.S. 891 (2001).

42 U.S.C. § 11101 lists Congress' findings in support of the legislation:

> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual state.
>
> (2) There is a national need to restrict the ability of incompetent physicians to move from state to state without disclosure or discovery of the physician's previous damaging or incompetent performance.
>
> (3) This nationwide problem can be remedied through effective professional peer review.
>
> (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.
>
> (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

Recognizing the potential pitfalls to individual physicians from participating in peer reviews, the statute provides them immunity from liability for money damages. 42 U.S.C. § 11111(a)(1). It also accords peer review protection and privileged status to three categories of documents, but only if the information is provided to National Reporting Agencies: (1) medical payments made by the facilities; (2) sanctions of physicians by the Board of Medical Examiners; and (3) Professional Review actions that adversely affect the privileges of a practitioner. 42 U.S.C. § 11137(b)(1). Yet Congress, while recognizing the need for effective peer review and the potential dangers associated with it, still ***did not*** establish a privilege for most documents involved in the peer review

process, including those at issue here, nor did it accord any type of discovery immunity to peer review participants.

Congress' silence in this regard persuaded both the Ninth Circuit in *Agster* and the Fourth Circuit in *Virmani* that any change in the peer review privilege was to be made by Congress.[4] This same inaction on the part of Congress has been equally compelling to the district courts.[5] Indeed, concluding otherwise would permit the federal courts to misappropriate the power of Congress.

Petitioners contend that the variations in the cases (though, in truth, there is little variation) can be explained on the basis of the context of the case—those involving discrimination, civil rights, and antitrust claims may be more likely ***not*** to find a peer review privilege than a medical malpractice case. This alleged distinction is of little merit here, as the Agsters' civil rights claim is one for wrongful death occasioned by

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[4] The Seventh Circuit case refusing to find a federal peer review privilege predated enactment of the HCQIA, and instead was based on the Court's conclusion that: "The public interest in private enforcement of federal antitrust law in this context is simply too strong to permit the exclusion of relevant and possible crucial evidence by application of the Hospital's privilege." *Shadur*, 664 F.2d at 1063.

[5] *Johnson*, 169 F.R.D. at 560 ("Congress spoke loudly with its silence in not including a privilege against discovery of peer review material in the HCQIA"); *Robertson*, 169 F.R.D. at 84 (referencing Congress' silence on the subject of a federal peer review privilege in the HCQIA, the Court concluded that Congress did not intend peer review committee records to have the level of confidentiality and protection they may have pursuant to a state statute); *Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 694 (N.D. Cal. 1991) (holding hospital peer review documents discoverable and not privileged in an antitrust action: "Congress spoke loudly with its silence in not including a privilege against discovery of peer review materials in the HCQIA."); *Swarthmore Radiation Oncology, Inc. v. Lapes*, 1993 WL 517722 (E.D. Pa. 1993) (the court looked to the HCQIA for guidance as to whether a doctor's application for staff privileges was protected under the state peer review statute, concluding that because of Congress' silence, it was not).

Petitioners' deliberate indifference and excessive force—not mere medical negligence. But even if it were a medical malpractice case, no federal peer review privilege would bar the discovery sought:

> To suggest that the search for truth by the courts has stronger justification and may override an asserted peer review privilege in a discrimination case but not a malpractice case minimizes the strong public interest in the prevention and compensation of serious personal injuries or death caused by government employees, an interest at least equal to the interest in eradicating and compensating for violations of a person's civil rights. The value of protection against job discrimination is substantially reduced if the ability to enjoy its benefit is physically impaired or ended. ***Privileges usually do not vary depending upon the nature of the action as their very purpose is to bar compelled disclosure irrespective of the nature of the proceeding in connection with which they may arise.*** The hospitals' attempt to distinguish *University of Pennsylvania* on the basis of the underlying causes of actions in that case and the other cases relied upon by the court from the one at bar is without merit.

Syposs v. United States, 63 F. Supp. 2d 301, 304 (W.D. N.Y. 1999) (emphasis added).

Both *Syposs* and *Tucker v. United States*, 143 F. Supp. 2d 619 (S.D. W.Va. 2001) were actions brought under the Federal Tort Claims Act. Both courts were asked to apply a federal peer review privilege to preclude disclosure of certain information. And both courts declined to do so for the same reason: "where Congress had the opportunity to create a privilege pursuant to statute [HCQIA], yet failed to do so, courts should be especially hesitant in recognizing a federal privilege." *Tucker,* 143 F. Supp. 2d at 626-627. The duty to recognize the federal peer review privilege "requires a weigh-

ing of interests more appropriate for Congress than for the courts." *Id.*; *Syposs*, 63 F. Supp. 2d at 304 (holding same).

III. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS ON THE QUESTION OF THE PEER REVIEW PRIVILEGE.

There are no conflicting circuit court decisions on the issue, and thus no reason for this Court to intervene. The Seventh Circuit rejected the peer review privilege in *Shadur*, but did so on the basis of the importance of the requested material to the antitrust claim involved.[6] The Fourth Circuit, in *Virmani*, declined to find peer review records privileged from discovery in a discrimination action, in part because Congress had failed to create such a privilege in the HCQIA. *Virmani*, 259 F.3d at 291. The Ninth Circuit found the same reason compelling. *Agster*, 406 F.3d at 1094.

Contrary to Petitioners' contention, the Fifth Circuit did not reach the opposite conclusion. Nothing in the *Harris Methodist* case reflects the Court's endorsement of a medical peer review privilege. At issue there was the reasonableness of an administrative search under the Fourth Amendment. At one point, the court mentioned that "the medical peer review process 'is the *sine qua non* of adequate hospital care,'" citing *Bredice*, a case decided before the enactment of Rule 501 or the HCQIA. *Harris Methodist*, 970 F.2d at 103. This mention of peer review is *dicta*, as demonstrated by the sentence immediately following it: "[B]ecause we affirm the district court's determination that the proposed search exceeded bounds of reasonableness, ***we need not define the scope of any applicable privilege***." *Id.* (emphasis added). Notably, the Fourth Circuit, in *Virmani*, expressly rejected the *Harris Methodist* case as supporting recognition of the peer review privilege. "This case [*Harris*] is, therefore, inap-

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[6] *Shadur* predated enactment of the HCQIA.

posite, since it involves the balancing interests under the Fourth Amendment, not Federal Rule of Evidence 501." *Virmani*, 259 F.3d at 293.

While acknowledging that the Fifth Circuit did not directly address the peer review issue, Petitioners amazingly claim that "there can be no doubt that *Harris Methodist* and the protection from discovery it contemplates for medical peer reviews are the law within the Fifth Circuit," *citing Poliner v. Texas Health Sys.*, 201 F.R.D. 437 (N.D. Tex. 2001). Maricopa County Petition, at 7. Quite the opposite is true. In *Poliner*, the Magistrate recognized that the HCQIA creates ***no*** bar to discovery of the peer review material sought. While the Magistrate noted the absence of a federally recognized peer review privilege, he then, without authority, concluded that "it is clear that Congress recognized that peer review materials are sensitive and inherently confidential, and that confidentiality serves an important public interest. *See* 42 U.S.C. § 11101." *Poliner*, 201 F.D.R. at 438. He made no mention of the protections that Congress did choose to include or exclude from the Act. Despite this—unsupported—reference to Congressional intent, the Magistrate then proceeded to order the discovery produced with very few restrictions (patient names were redacted and a protective order issued). The Magistrate's ruling in *Poliner* provides Petitioners no support for their position and hardly serves to illustrate a rift among the circuit courts.

Petitioners also argue that in the HCQIA's treatment of peer reviews themselves Congress did nothing different from what it did in enacting Federal Rule of Evidence 501: they claim it neither prescribed nor proscribed a particular privilege. This is simply nonsensical, conflicting with the basic rules of statutory construction. The Act expressly prescribes when the peer review privilege applies, to what and to whom.

IV. CONGRESS HAS ADDRESSED THE PEER REVIEW PRIVILEGE ON SEVERAL OTHER OCCASIONS, AND NONE OF THOSE ENACTMENTS APPLY HERE.

Congress could have gone further and enacted a broader or even a blanket privilege. It has done so in other instances. For example, medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged. 10 U.S.C. § 1102(a). The same is true for medical quality assurance records created by or for the Department of Veteran's Affairs, and those created by or for the Coast Guard. 38 U.S.C. § 5705(a); 14 U.S.C. § 645(b). Finally, the Peer Review Improvement Act, which is part of the Social Security Act of 1982, provides that materials generated by a peer review organization ("PRO") in pursuit of its statutory function (auditing federally funded healthcare) are not subject to discovery and that no document collected is subject to production. 42 U.S.C. § 1320(c-9).

These statutes demonstrate that Congress ***will*** create a broad peer review privilege ***when it is so inclined.*** Its failure to create this kind of blanket privilege or to create a more expansive privilege than it did in the HCQIA is evidence of Congressional intent ***not*** to create such a privilege. To judicially create such a privilege here would run counter to this Court's proclamation in *University of Pennsylvania*, that courts must be "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." 493 U.S. at 189.

V. THE DISTRICT COURT CASES CITED BY PETITIONERS ARE AGAINST THE WEIGHT OF AUTHORITY.

Petitioners argue that confusion among the lower courts justifies this Court's intervention. But the cases they cite are considered anomalies and against the weight of federal authority.

In *Weekoty v. United States*, 30 F. Supp. 2d 1343 (D. N.M. 1998), the district court stated that congressional action in other areas dealing with a peer review privilege combined with state legislative recognition of the privilege, overcame any impediment caused by Congress' failure to act in this specific regard. *Weekoty*, 30 F. Supp. 2d at 1347. This conclusion has been soundly criticized by other courts. For example, the court in *Tucker* stated: "In *Weekoty*, the court recognized a self-critical analysis privilege in an FTCA case. Although the court in *Weekoty* noted that the HCQIA establishes confidentially for certain records relating to the peer review process, *Weekoty*, 30 F. Supp. 2d at 1347, the court made no attempt to address Congress' failure to enact a blanket federal peer review privilege." *Tucker*, 143 F. Supp. 2d at 627. The same conclusion was reached in *Syposs*:

> For the reasons discussed, this court respectfully disagrees with the court's reasoning in *Weekoty*. First, *Weekoty* asserts, relying on a law review article (citation omitted) that the peer review privilege has a "unique role in preserving the public health." *Weekoty, supra*, at 1345. However, a complete reading of the article reveals it is primarily a commentary on the state peer review statutes and relevant case law and contains no objective studies or other opinion to support the court's broad assertion. Second, the court held that considerations of comity required deference to the New Mexico peer review privilege statute. *Weekoty* at 1346. As discussed, *supra*, deference to

> state privilege statutes is not required for federal courts. Third, although the court notes that the HCQIA established confidentiality for certain records relating to the peer review process, the court makes no attempt to address Congress' failure to enact a federal privilege for all such records the absence of any such privilege. ***Thus, the court's analysis is in opposition to the Supreme Court's admonition in University of Pennsylvania that courts should hesitate in finding a privilege when Congress has declined to do so.***

Syposs, 63 F. Supp. 2d at 308 (emphasis added).

Furthermore, *Brem v. DeCarlo, Lyon, Hearn & Pazourek, PA*, 162 F.R.D. 94 (D. Mass. 1995), is of no support, as the only claim in *Brem* to which the deposition request at issue related was a state defamation claim, not the federal discrimination claims. Rule 501 requires application of state privilege law to the state claim. The court did not reach the question of whether the federal common law recognized a parallel privilege.

In *Balk v. Dunlap*, 163 F.R.D. 360 (D. Kan. 1995), the Court failed to address what claims were being made, and whether a federal question was involved or not. It cannot serve as a basis for Petitioners' position. And, finally, both *Bredice, supra*, and *Gillman v. United States*, 53 F.R.D. 316 (S.D. N.Y. 1971) were decided before Rule 501 and the HCQIA were enacted and can serve as no compelling authority for Petitioners' position.

These cases fail to overcome the cogent analysis and compelling authority of the cases where the adoption of a federal peer review privilege in a federal question case is squarely addressed. And those cases are in agreement: there is no federal peer review privilege.

VI. THE ACTIONS OF THE STATES NEED NOT BE CONSIDERED WHERE CONGRESS HAS ACTED.

Petitioners argue that the existence of state peer review privileges in most jurisdictions should compel the conclusion that "reason and experience" mandate the adoption of a federal counterpart. But because Congress has acted in the area, or, as here, chosen not to act, this Court need not reach the "reason and experience" analysis, and the policy decisions of the states are irrelevant. Most courts agree: "Whether the public interest would be served by a medical peer review privilege in federal cases requires a weighing of interests more appropriate for Congress than for the Court. Thus, the fact that such peer review privileges exist under numerous state statutes is immaterial." *Syposs v. United States*, 179 F.R.D. 406, 412 (W.D. N.Y. 1998), *adhered to on reconsid.*, 63 F. Supp. 2d 301 (1999).

VII. THE POLICY REASONS JUSTIFYING STATE PEER REVIEW STATUTES ARE ABSENT IN THIS CIVIL RIGHTS CASE.

One of the frequently cited policy reasons given for peer review protection in state cases is to encourage candor among the physician participants. Arizona is included.

> However, doctors seem to be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect, and friends, possible retaliations, vulnerability to torts, and fear of malpractice actions in which the records of the peer review proceedings might be used.

Humana Hospital v. Superior Court, 154 Ariz. 396, 400, 742 P.2d 1382, 1386 (App. 1987).

Most of these policy reasons are absent here, diluting the argument for the need for protection. The same social and

economic dynamics at play among private physicians at a private hospital, dynamics considered in the peer review decisions, are largely inapplicable to employees of the County's Correctional Health Service. The detainee-patients are not ***voluntary*** patients.

Nor has the County shown that its employees would forego participation in peer review because of the threat of disclosure. Not all participants would. "A doctor called upon to serve on a medical peer review committee may have a sense of obligation to the public at large, in addition to a personal desire to maintain quality health care, which may overcome any reluctance to serve and be forthcoming on a peer review committee, even in the absence of a privilege." *Virmani*, 259 F.3d at 290, n. 7. Indeed, for decades, government health care providers have participated in peer review activities without a federal peer review privilege. What has suddenly changed, requiring the Court to create a new privilege?

Finally, as the Ninth Circuit noted, the public's interest in accountability regarding the manner in which the prisons are run trumps any privacy interest the jailors might have. Federal claims, such as § 1983 civil rights claims for deliberate indifference and excessive force, carry a tremendous national interest. Indeed, there is good reason for Congress' repeated refusal to enact a broad privilege that would prevent the disclosure of vital evidence for such federal claims. The federal courts should not be the mechanism to create this privilege, after Congress has refused to do so. Petitioners and the American Medical Association should be forced to continue lobbying Congress to create a new privilege.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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No. 05-139

MOTION FILED

AUG 29 2005

In The
Supreme Court of the United States

MARICOPA COUNTY, a public entity, and MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES, a division of Maricopa County,

Petitioners,

v.

CAROL ANN AGSTER, personal representative of the Estate of Charles J. Agster, III, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO JOIN IN FILING BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The California State Association of Counties ("CSAC")[1] hereby respectfully moves for leave to join Los Angeles County and the Los Angeles Sheriff's Department in filing the attached brief *amici curiae* in this case. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

CSAC is a non-profit corporation whose membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. Because of its membership, CSAC is in a position to provide a unique perspective to this Court to aid in the decision of the important issue raised by Petitioners.

Almost four decades ago, the California State Legislature provided confidentiality to members of medical peer review committees. The state privilege has fostered an environment where health care professions can self-critique candidly behind closed doors to promote quality patient care without fear of being drawn into a civil lawsuit.

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[1] The County of Los Angeles and Los Angeles County Sheriff's Department are exempt from the consent requirement under Rule 37.4.

CSAC believes that the Ninth Circuit's decision undercuts the public policy of the state of California and renders its medical peer review privilege practically meaningless. Physicians in California must now worry that their once-privileged communications in a peer review setting may be discoverable in a federal court proceeding. This uncertainty will undoubtedly have a chilling effect on a process that has now been recognized by all 50 states as a highly effective means of promoting quality health care. Because of the devastating impact of the Ninth Circuit's decision on health care facilities in all California counties, CSAC respectfully requests leave to join the County of Los Angeles and the Los Angeles County Sheriff's Department in the attached brief *amici curiae* in support of petitioners.

Respectfully submitted,

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BRIEF OF THE COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted on behalf of Los Angeles County, the Los Angeles County Sheriff's Department and the California State Association of Counties ("CSAC").[2] A motion for leave to file an *amici* brief under Supreme Court Rule 37.2(b) on behalf of CSAC is included with this brief.

I. INTERESTS OF *AMICI CURIAE*

CSAC is a non-profit corporation whose membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. California counties oversee the operation of approximately twenty hospitals and numerous health centers and detention facilities through the state.

The County of Los Angeles has a population of over 10.2 million people and occupies an area of approximately 4,061 square miles in southern California. The County of Los Angeles operates five acute hospitals, one multi-service

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[2] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ambulatory care center, six comprehensive health centers and nine health centers, and contracts with a number of community-based clinics. It is estimated that these hospitals provide approximately half of all trauma care to patients in Los Angeles County.

The Los Angeles County Sheriff's Department operates the largest municipal jail system in the United States with a daily average inmate population between 18,000 and 20,000. Its Medical Services Bureau oversees thirteen medical facilities, including the nation's largest mental health institution. On average, the custody system provides medical care to 6,000 inmates per day, and handles more than one million units of drugs per month.

Amici support the petition for writ of certiorari due to their deep concern about the impact of the Ninth Circuit's decision denying recognition of a medical peer review privilege. For many years, *amici* have relied upon the medical peer review process to advance and promote quality health care for millions of California residents. These reports have been privileged under California law for almost four decades.

But now the Ninth Circuit's decision threatens to unravel a system that has been widely accepted by hospital administrators nationwide. The government operated health care facilities under *amici's* jurisdiction are especially vulnerable to lawsuits in federal court based upon state action. This is particularly true of the Medical Services Bureau of the Los Angeles County Sheriff's Department, where it is not uncommon for inmates to file lawsuits for alleged violations of civil rights. The Ninth Circuit's refusal to recognize a federal medical peer review privilege will have a profound influence on *amici's* hospitals as it encourages

forum shopping by plaintiffs and, most significantly, discourages physicians from serving on peer review committees. Those physicians who do participate in the peer review process will be far less frank in their assessments due to fear of being drawn into a federal lawsuit. This chilling effect will stifle *amici's* ability to self-police its medical facilities and will result in a negative impact upon the quality of health care throughout California.

II. SUMMARY OF ARGUMENT

Every state in the nation has now determined that the quality of hospital health care will be elevated by shielding medical peer review reports with a degree of confidentiality. Indeed, confidentiality is absolutely essential to the effective administration of peer review committees in a medical setting because it fosters an environment of candor and receptivity. Thus, the medical peer review process encourages competence in the medical profession and promotes improvement by frankly evaluating both positive and negative aspects of hospital care. Accordingly, the Ninth Circuit's decision is out of harmony with the reasoned and experienced implementation of public policy in this country.

Petitioners' stated reasons for granting the petition are clearly presented and legally sound. *See* Pet. 6-15. The uncertainty and lack of uniformity in the federal courts is a clarion call to this Court to continue the evolution of the federal common law in the area of privilege. Moreover, the overwhelming, indeed unanimous, recognition of confidentiality of medical peer review proceedings by the 50 states should be given due consideration in finding that a federal common law privilege exists.

Amici have a particular interest in persuading this Court to grant certiorari. Medical peer review reports have been privileged under California law for more than four decades. It is well accepted in California that the medical peer review process fosters competence in the medical profession through a confidential procedure of evaluating both positive and negative aspects of health care. Long ago, the Supreme Court of California interpreted the legislative history of the privilege. It acknowledged a legislative judgment that the benefits to the quality of hospital care afforded by the privilege outweigh a plaintiffs' right to access to the reports of medical peer review committees.

The Ninth Circuit's recent decision, therefore, is contrary to California public policy. It threatens to eviscerate the privilege established over forty years ago by the California legislature. The lack of a federal peer review privilege in the Ninth Circuit discourages California's hospital staff from candid self-evaluation. The chilling effect on the medical peer review process will have a correlating negative impact upon the quality of hospital care in California. The uncertainty of the privilege in the state is now akin to no privilege at all.

In addition, the conflict between the federal and state law of privilege in California encourages forum shopping by plaintiffs and places a particularly heavy burden on public hospitals and prison medical facilities that are vulnerable to being sued in federal court. California's indigent, who often turn to public health care facilities, will suffer most from a certain decline in the quality of health care.

The uncertainty and confusion among the federal courts, as well as the conflicts between the federal circuits and states, calls out for higher review. The effect of the Ninth Circuit's refusal to recognize a medical peer review privilege goes far beyond the physicians and hospital staff involved in the peer review process. The strong public policy favoring quality health care requires intervention by this Court.

III. ARGUMENT IN SUPPORT OF GRANTING THE PETITION

THE NINTH CIRCUIT'S DECISION REFUSING TO RECOGNIZE A MEDICAL PEER REVIEW PRIVILEGE UNDERCUTS CALIFORNIA POLICY AND EVISCERATES THE LONG-ESTABLISHED PROMISE OF CONFIDENTIALITY PROVIDED UNDER CALIFORNIA LAW TO THE DETRIMENT OF STATE-WIDE HEALTH CARE.

1. Medical Peer Review in California

Amici operate public health care facilities that provide medical care for millions of patients throughout the state of California. These health facilities, clinics and correctional treatment centers are subject to state regulation similar to those in Arizona. *See* Pet. 5. Title 22 of the California Code of Regulations mandates that each facility employ a medical director, whose responsibilities include "[e]stablishing and implementing a system of peer review pursuant to written procedures." (*Cal. Code Regs.*, tit. 22, §79775, subd. (c)(4).)

No one would disagree that medical doctors should have an opportunity to discuss a patient's care and to receive recommendations from other physicians. This

practice is decidedly in a patient's best interests, as it allows doctors to benefit from the collective experience and knowledge of their colleagues. Similarly, the peer review process enhances the quality of health care as its primary purpose is to evaluate the soundness of a physician's diagnosis and treatment. Thus, medical peer review encourages competence in the medical profession and fosters improvement by evaluating both positive and negative aspects of hospital care.

Records of peer review committees have long been privileged from discovery under California law. Evidence Code section 1157, subdivision (a), first enacted in 1968, provides in pertinent part: "Neither the proceedings nor the records of organized committees of medical . . . staffs in hospitals, or of a peer review body . . . having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, . . . shall be subject to discovery." California courts have explained that the immunity described in the statute "extends to, first, the proceedings, and second, the records of the described staff committees." *Matchett v. Superior Court*, 40 Cal. App. 3d 623, 628, 115 Cal.Rptr. 317 (1974).

Indeed, almost twenty years ago, the Supreme Court of California acknowledged the strong public interest served by preserving the confidentiality of the medical peer review process. The court explained that the California Legislature enacted the privilege "upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality . . . and represents a legislative choice between competing public

concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence."[3] *West Covina Hospital v. Superior Court*, 41 Cal.3d 846, 853-854, 718 P. 2d 119, 123, 226 Cal.Rptr. 132, 136 (1986).

The importance of confidentiality of peer review reports on the efficient functioning of California's hospitals cannot be overstated. The California Legislature immunized peer review reports from discovery to foster an environment where medical professionals could self-police and promote quality patient care through periodic review of physicians' activities. Without such protection it is unlikely that physicians will be willing to serve on quality assurance committees, nor be willing to freely discuss the performance of physicians practicing in the hospital.

2. Impact of Ninth Circuit's Decision.

Because of the uncertainty caused by the Ninth Circuit's decision not to recognize the privilege in federal law, doctors are unlikely to participate candidly in a process that previously was vital to the improvement of health care. Without the free flow of opinions between doctors regarding patient care, hospitals will suffer and patients will suffer. Obviously, these results are contrary to the goal of the state legislature.

On the other hand, plaintiffs have an incentive to file lawsuits alleging federal claims as a device to force disclosure. Public hospitals and prison medical facilities with high

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[3] Significantly, this balancing test would not apply in the Maricopa County lawsuit because, as pointed out by Petitioner, the facts and circumstances surrounding the inmate's death were detailed in an extensive report produced to respondents in discovery. *See* Pet. 4.